

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No.372 of 2022

Amulya Kumar Swain

.... Petitioner

Mr. N.K.Sahu
Advocate

-versus-

State of Odisha

.... Opposite Party

Mr.P. Tripathy,
Addl. Standing Counsel

CORAM:

JUSTICE SASHIKANTA MISHRA

ORDER
02.12.2022.

Order No.

- 03.
1. This matter is taken up through hybrid mode.
 2. It is submitted by Mr. N.K. Sahu, learned counsel for the Petitioner that as directed the Petitioner has deposited 50% of the compensation amount in the court below.
 3. The Petitioner was convicted by the Court of learned S.D.J.M., Bhadrak in I.C.C. No.1/2009 for the offence under Section 138 of the N.I. Act and was sentenced to undergo simple imprisonment for a period of six months and to pay a fine of Rs.40,000/-.

4. The Petitioner preferred an appeal in the Court of District and Sessions Judge, Bhadrak being CrI. Appeal No.42/2013. The said appeal was dismissed for non-prosecution by order dated 22nd March, 2021 passed by learned Sessions Judge, Bhadrak. The Petitioner thereafter filed an application for restoration of the appeal along with a petition for condonation of delay. Learned Sessions Judge by order dated 8th July, 2022, which is impugned herein, dismissed the petition holding that the said Court had no power to restore the appeal. In doing so, learned Sessions Judge took note of several case laws including the case of **Sankatha Singh v. State of Uttar Pradesh**; reported in AIR (1962) SC 1208.

5. The moot question that arises for consideration in the present revision is, whether the Sessions Judge has power to restore an appeal dismissed for non-prosecution.

6. It would be apposite to state at the outset that a Criminal Appeal cannot be dismissed for the default of the appellant or their counsel. The Court either has to adjourn hearing of the appeal to enable them to appear, or should consider the appeal on merit and pass the final order. In the case of **Bani Singh v. State of U.P.**; reported in (1996) 4 SCC 720, the Supreme Court held as follows:-

“We have carefully considered the view expressed in the said two decisions of this Court and, we may state that the view taken in Shyam Deo case appears to be sound except for a minor

clarification which we consider necessary to mention. The plain language of Section 385 makes it clear that if the appellate court does not consider the appeal fit for summary dismissal, it 'must' call for the record and Section 386 mandates that after the record is received, the appellate court may dispose of the appeal after hearing the accused or his counsel. Therefore, the plain language of Sections 385-386 does not contemplate dismissal of the appeal for non-prosecution simpliciter. On the contrary, the Code envisages disposal of the appeal on the merits after perusal and scrutiny of the record. The law clearly expects the appellate court to dispose of the appeal on merits, not merely by perusing the reasoning of the trial court in the judgment, but by cross-checking the reasoning with the evidence on record with a view to satisfying itself that the reasoning and findings recorded by the trial court are consistent with the material on record. The law, therefore, does not envisage the dismissal of the appeal for default or non-prosecution but only contemplates disposal on merits after perusal of the record. Therefore, with respect, we find it difficult to agree with the suggestion in Ram Naresh Yadav case that if the appellant or his pleader is not present, the proper course would be to dismiss an appeal for non-prosecution."

7. Learned Sessions Judge himself has referred to some decisions of this Court where it has been held that a criminal appeal cannot be dismissed for default once it has been admitted. Learned Court below has referred to the decision of the Supreme Court in the case of **Parsuram Patel v. State of**

Orissa; reported in (1994) 4 SCC 664. Thus, the legal position that emerges is, a criminal appeal cannot be dismissed for non-prosecution.

8. Now the question arises whether a criminal appeal dismissed for non-prosecution notwithstanding the aforementioned legal proposition, can be restored by the same court. Learned Sessions Judge has referred to the decision of **Sankatha Singh** (supra) to hold that the appeal dismissed for default can be restored only by order of a superior Court but not by the Sessions Court. I have perused the judgment rendered in **Sankatha Singh** (supra) wherein it has been stated in paragraph-7 as under:

“7. A criminal appeal cannot be dismissed for the default of the appellants or their counsel. The court has either to adjourn the hearing of the appeal to enable them to appear, or should consider the appeal on merits and pass the final order. Shri Tej Pal Singh was aware of this as his order itself indicates. He did not dismiss the appeal for default. He himself perused the judgment of the Magistrate and the record and did consider the merits, as he says in his order “I find no ground for any interference.” The mere fact that he had not expressed his reasons for coming to that opinion does not mean that he had not considered the material on record before coming to the conclusion that there was no case for interference. His omission to write a detailed judgment in the circumstance may be not in compliance with the provisions of Section 367 of the Code and may be liable to be set aside by a superior court, but will not give him any

power to set it aside himself, and rehear the appeal. Section 369, read with Section 424 of the Code, makes it clear that the appellate court is not to alter or review the judgment once signed, except for the purpose of correcting a clerical error.”

9. The facts of the said case are clearly different from the facts obtaining in the present case inasmuch as the case considered by the Apex Court was not a case dismissed for non-prosecution/default, but on merits though by a non-speaking order. In such case, the Apex Court noted the fact that despite absence of appellant or his counsel the Sessions Judge had perused the judgment of the Magistrate and the record and had disposed of the case on merits by stating that he found no ground for any interference. It was further held by the Apex Court that merely because no reasons were expressed in coming to the opinion does not mean that the Court had not considered the materials on record. In other words, the Apex Court held that the same was an order on merits. In that context, the Apex Court held that only a superior Court should set aside the order.

10. In the present case, the learned Sessions Judge has not considered the merits of the case by perusing the records or the impugned judgment, but has dismissed the appeal for non-prosecution because of absence of the appellant and his counsel. Obviously, the decision in **Sankatha Singh** (supra) would be applicable in the facts of the present case.

11. Evidently, the learned Sessions Judge was not alive to the above legal proposition and therefore, this Court is of the considered view that the learned Sessions Judge committed material illegality in holding that he had no power to restore the appeal. It is the settled position of law that every Court has inherent power to correct his own mistakes. Reference may had to the decision of the Apex Court rendered in the case of ***Grindlays Bank Ltd. v. Central Government Industrial Tribunal and others***; reported in AIR 1981 SC 606.

12. In such view of the matter, this Court holds that the impugned order cannot be sustained in the eye of law. Accordingly, the Crl. Revision is allowed. The impugned order is set aside. The matter is remitted to the learned Court below for passing necessary orders to restore the appeal and hear the same on merits.

13. No coercive action shall be taken against the Petitioner till then.

14. Urgent certified copy of this order be granted on proper application.

AKB

(***Sashikanta Mishra***)
Judge

